

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Ruddell v. B.C. Rail Ltd.***,
2005 BCSC 1504

Date: 20051025
Docket: L032814
Registry: Vancouver

Between:

Frederick Albert Ruddell

Plaintiff

And

BC Rail Ltd.

Defendant

Before: The Honourable Mr. Justice R.R. Holmes

Reasons for Judgment

Counsel for the Plaintiff:

David A. Klein
Shauna Tucker

Counsel for the Defendant:

Craig A.B. Ferris
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Date of Hearing:

April 25-28, 2005

Additional authorities received:

June 2, 2005 and October 7, 2005

Place of Hearing:

Vancouver, B.C.

INTRODUCTION

[1] The plaintiff claims that through the alleged inequitable allocation of an actuarial surplus in the BC Rail Ltd. Pension Fund, the defendant breached a

fiduciary duty owed to the plaintiff. The parties present concurrent applications to have the Court determine the manner in which this dispute should be resolved.

[2] The plaintiff seeks certification of his action as a class proceeding on behalf of himself and other plan members pursuant to the **Class Proceedings Act**, R.S.B.C. 1996, c. 50 (the "**Act**").

[3] The defendant's application is to stay the plaintiff's action in favour of arbitration of the issues, pursuant to s. 15 of the **Commercial Arbitration Act**, R.S.B.C. 1996, c. 55 ("the **CAA**").

[4] Pursuant to s. 4(1) of the **Act**:

The court must certify a proceeding as a class proceeding ... if all the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

- (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[5] The plaintiff argues that the criteria in s. 4(1) of the **Act** have been met.

[6] The defendant relies upon the requirement in s. 62(1) and (2) of the **Pension Benefit Standards Act**, R.S.B.C. 1996, c. 352 (the "**PBSA**"), that a pension plan must contain a provision "...for final and conclusive settlement by arbitration..." and is deemed to contain that provision if not expressly incorporated. The defendant relies upon s. 15(2) of the **CAA**, which provides "...the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.", and none of these exceptions are applicable.

[7] The British Columbia Court of Appeal in **Mackinnon v. National Money Mart Co.**, [2004] B.C.J. No. 1961, 2004 BCCA 473, at ¶57 considered the ability of the trial judge in a similar circumstance to consider a stay action under the **CAA**.

The refusal to grant a stay of the action was premature. An arbitration agreement can be said to be "inoperative" only after the court has determined that a class proceeding must be certified because it is the preferable procedure and has met the other requirements for certification. The decision whether to grant a stay of an intended class proceeding should not be made before the court determines whether the action will be certified as a class proceeding.

I intend therefore to consider the two applications in combination.

BACKGROUND

[8] The plaintiff is a retired employee of the defendant, BC Rail, and a retired member of the BC Rail Pension Plan (the “**Plan**”).

[9] The plaintiff alleges for himself and others similarly situated that an inequitable allocation of an actuarial surplus in the Plan’s Pension Fund (the “**Fund**”) occurred when the surplus was "crystallized" as the defendant and the active employees under the Plan commenced a contribution holiday.

[10] The plaintiff’s claim is that a disproportionate allocation of an actuarial surplus favouring the Plan’s active members over its retired and deferred vested members occurred as a result of a breach by the defendant of fiduciary duties it owed to treat all members of the Plan in an even-handed manner.

[11] The plaintiff claims for an accounting and an equal distribution of benefits between members of the Plan as well as equitable, general and special damages. In this application, the plaintiff seeks to have the action certified as a class proceeding, to have himself appointed as representative plaintiff, and for ancillary orders pursuant to the **Act**.

FACTS

[12] The defendant is the Plan administrator. The Fund assets are held and administered for the benefit of the Plan beneficiaries, which include the proposed plaintiff class.

[13] The Fund has three categories of beneficiary:

- a person making contributions to the Fund ("active member"),
- a person who previously made contributions to the Fund, which deposits remain on deposit, and no benefits are being received from the Fund ("deferred vested members"), and,
- a person who previously contributed to the Fund and is receiving benefits from the Fund ("retired member").

[14] Pre-retirement and post-retirement benefits are payable to surviving spouses, beneficiaries or the estates of Plan members.

[15] As of December 31, 1997 it was reported the Plan had 2244 active members, 712 retired members, and 76 deferred vested members. As of December 31, 2001 there were 1922 active members, 888 retired members, and 158 deferred vested members. [Affidavit of Debbie Wilson, actuary, Mercer Human Resources Consulting, sworn March 30, 2003, paragraph 5]

[16] The Plan's 2002 Annual Report indicated that as of December 31, 2001 the plaintiff had an actuarial surplus of \$151.7 million dollars being the amount the assets and projected income of the Plan exceeded the Plan's projected liabilities.

[17] The surplus accumulated over a long period of time from contributions of then Plan members including proposed members of the plaintiff class, who made compulsory contributions.

[18] The Plan was amended July 1, 1998 to provide a contribution holiday by the defendant, which suspended the obligation of the defendant, as employer, and the

active members of the Plan, to make contributions. No correlative provision for a benefit to retired or deferred vested members was made.

[19] At the time of the July 1, 1998 amendment the BC Rail Ltd. Pension Committee was composed of two employee representatives, two representatives of the defendant BC Rail, and a Chair. The Committee was concerned with matters of administration and interpretation of the Plan.

[20] On September 15, 1999, December 8, 1999 and August 2001, Frances Ferguson, a retiree, who was an employee representative on the Pension Committee notified the Committee that retirees who had contributed to the accumulation felt that they should benefit equally with active members in any surplus allocation.

[21] Ms. Ferguson notified the Pension Committee specifically of an instance where a cash distribution was made to retirees of another Plan, administered by CMHC, and requested a similar cash distribution for retirees of the defendant's Plan. The plaintiff alleges that the defendant took no action in respect of the request.

[22] In 2001 the Plan was amended such that the Pension Committee was replaced by the Pension Advisory Committee (the "PAC") which was to provide advice on pension matters to the defendant's Retirement Committee and to facilitate communication to and from Plan members. The Committee is comprised of one retired Pension Plan member, one elected active member, one appointee of the Joint Council of Unions, and one management appointee. The plaintiff is the retiree's representative on the PAC.

[23] On May 27, 2003 the plaintiff voiced the retired members' concern that as their contributions had partially caused the Plan's accumulated actuarial surplus, they should receive the same level of financial benefit enjoyed by the defendant and the active employees resulting from the contribution holiday.

[24] On October 3, 2003, after the defendant's failure to respond to the retired members' concerns, the plaintiff's commenced this action pursuant to the **Act**.

[25] The action alleges that the July 1, 1998 amendment permitting a contribution holiday by the defendant and active members without a corresponding benefit to the plaintiff and the class members, breached the defendant's duty of even-handedness and was a conflict of interest favouring the rights of the defendant and active members over the plaintiff and the class.

[26] The remedy sought includes an accounting, distribution of lump sum or periodic cash distributions from the Fund in accordance with the actuarial liabilities they represent, and for damages against the defendant.

THE DEFENDANTS APPLICATION TO STAY THE ACTION

[27] The defendant opposes the certification of the plaintiff's action on the basis it is not the preferable method to resolve the issues raised. The defendant also applies to stay the action in favour of arbitration pursuant to the **CAA**.

[28] The defendant's position is that the Plan and the **PBSA** require that the issues raised in the action be resolved by arbitration as s. 62(1) of the **PBSA** requires that every British Columbia pension plan:

... must contain a provision for final and conclusive settlement by arbitration, or another method agreed to by the parties to the plan, of disputes respecting the following ...

[29] In the event a Plan does not contain the arbitration provision s. 62(2) of the **PBSA** deems that:

... if a difference arises between the parties to a plan relating to any of those matters, any party may notify the other party, in writing, and within a prescribed time after receiving adequate notice of intent, of that party's desire to submit the difference to arbitration

[30] The Plan does by Article 15(1) provide for arbitration of:

... All disputes among parties (as defined in the [**PBSA**]) to the Plan which the [**PBSA**] requires to be settled by arbitration (and no other manner of disputes) shall be finally and conclusively settled by arbitration under the **Commercial Arbitration Act** (B.C.) and the Rules of the British Columbia International Commercial Arbitration Centre (BCICAC) for the conduct of domestic commercial arbitrations (the "Rules"), each as are in force at the time the dispute arises, except as otherwise provided in this Plan or the Act. Any case so arbitrated shall be administered by the BCICAC in accordance with the Rules. The place of arbitration shall be Vancouver, B.C.

[31] The plaintiff and the defendant are clearly parties as defined by s. 43(1)(c) of the **PBSA**.

[32] Not all disputes between Plan and member must contain a provision for "...final and conclusive settlement of arbitration or another method agreed to by the parties." Section 62(1)(a) however does require the provision for any "...provision of a plan under s. 24(1)(g)" which is "...the treatment of surplus arises during the

continuation of the plan...” and s. 62(1)(b) “...the taking of a contribution holiday under s. 41(1.2).”

[33] The defendant’s position is that the plaintiff objects to decisions made by BC Rail in respect of surplus assets existing in the Plan. The defendant also views the plaintiff as objecting to the defendant and active employees taking a contribution holiday during continuation of the Plan.

[34] I note however that categorization is not entirely in agreement with what I understand the plaintiff has advanced in regard to its position. The plaintiff submits that it does not object to the contribution holiday, rather it objects to the inequity said to occur in not treating the plaintiff and other class members in an “even handed” manner in distributing the benefits of the actuarial surplus.

NOTICE TO ARBITRATE

[35] The governing provision for notice to submit a dispute to arbitration is Article 15.2 of the Plan which provides:

A party to the dispute may commence an arbitration of the dispute by notifying the other party to the dispute of its desire to submit the dispute to arbitration. Such notification shall be made in writing within sixty days after receipt of adequate notice of intent of the event giving rise to the dispute...

[36] The provision is modeled after, but not identical to, s. 62(2) of the **PBSA** where “...any party may notify the other party, in writing, and within a prescribed time after receiving adequate notice of intent, of that party’s desire to submit the difference to arbitration...”.

[37] I agree with counsel for the defendant that the plaintiff "...did not provide adequate notice of his intention to dispute the contribution holiday until he served the Writ and Statement of Claim..." in this matter.

[38] The plaintiff argues that "adequate notice of intent" was given much earlier than commencement of this action through statements and discussions at the B.C. Rail Pension Advisory Committee meetings. I find no support in the evidence for the plaintiff's position on this point.

[39] There were requests, representations, discussions, suggestions, questions or opinions voiced by representatives at the Pension Advisory Committee meetings, as this was the purpose of those meetings. However, the plaintiff was required to give adequate notice of his intention to use a legal or formal process to dispute an issue under the Plan. I do not consider the defendant received any notification that the plaintiff intended to dispute the contribution holiday in any formal sense.

[40] I find the defendant complied within the Plan's time limit to request arbitration in this matter following service of the Writ and Statement of Claim in the action, which I find was the first "adequate notice of intent" that it received.

[41] Section 15(1) of the **CAA** provides:

15(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

[42] The law generally supports deference to arbitration provisions in Plans and as required by the **PBSA**. [*Cooper v. Deggan*, [2002] B.C.J. No. 2839, 2002 BCSC 1749; *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 66 B.C.L.R. (2d) 225, 50 C.L.R. 74 (S.C.); *Hebdo Mag. Inc. v. 125646 Canada Inc.* (1992), 22 B.L.R. (2d) 72, [1992] B.C.J. No. 2960 (S.C.)]

[43] Section 15(2) of the **CAA** requires that "the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed".

[44] The legislature has specifically considered and mandated the dispute resolution process to be used through the **PBSA** arbitration requirement. Indeed, the Supreme Court of Canada in *Schmidt et al. v. Air Products of Canada Ltd. et al.*, [1994] 2 S.C.R. 611 at ¶39 [*Schmidt*], approved and welcomed the "legislative steps" taken in British Columbia for arbitration.

[45] Often, the goal in providing for dispute resolution in a non-judicial forum is to avail the parties of a tailored forum and a decision maker with specialized knowledge and expertise in the area of the dispute . [*R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, 158 D.L.R. (4th) 193]

[46] Here, Article 15.2(i) of the Plan directs "...the parties to the dispute shall select as a single arbitrator an individual who, by virtue of his or her experience and training, can reasonably be considered an expert in pension matters...".

[47] In *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Gen. Div), the Court chose a Pension tribunal as an appropriate forum rather than a class proceeding because of the expertise of the tribunal and the nature of the question in issue.

ARBITRATION AND CLASS PROCEEDINGS ACT

[48] The defendant has shown a *prima facie* right to a stay of the plaintiff's action in favour of arbitration pursuant to the **CAA**.

[49] However, the arbitration provisions in the **PBSA** and the Plan, and their enforcement under s. 15 of the **CAA** conflicts with s. 4 of the **Act**. [*MacKinnon v. National Money Mart Co.* (2004), 26 B.C.L.R. (4th) 172, 2004 BCSC 136 at ¶13 [*MacKinnon*]]

[50] The conflict between the **CAA** and the **Act** exists in the present case and its resolution cannot be determined in the absence of consideration of the certification application as was ordered by the Court of Appeal in *MacKinnon*. [*MacKinnon v. National Money Mart Co.* (B.C.C.A.), [2004] B.C.J. No. 1961, 2004 BCCA 473 at ¶157]

[51] As Madame Justice Levine in *MacKinnon* (B.C.C.A.) at ¶46 observed “[t]he Legislature has not dealt with the competing statutory mandates directly”.

[52] It is obviously important to the resolution of the “competing statutory mandates” to first determine whether or not the action for certification can succeed, as one of the criteria for certification is that it is found to be the preferable procedure for the fair and efficient resolution of the common issues. That finding will be

relevant in considering whether the statutory and contractual right to arbitration under the **CAA** might be “void, inoperative, or incapable of being performed”.

[53] I therefore consider it appropriate to next consider the certification application and whether the certification criteria are met such that the court must certify the action as a class proceeding and thereby confirm the conflict between the **CAA** and the **Act**.

REQUIREMENTS FOR CERTIFICATION

1. The Pleadings Disclose a Cause of Action – Section 4(1)(a)

[54] The plaintiffs bringing a class action bear the onus of showing there is a cause of action, however the threshold for demonstrating this is very low. The test is comprehensively described by the Court of Appeal in *Elms v. Laurentian Bank of Canada* (2001), 90 B.C.L.R. (3d) 195, 2001 BCCA 429 at ¶20:

It is common ground that the Chambers judge correctly stated that a court will only refuse to certify on the basis that the pleadings do not disclose a cause of action if it is plain and obvious that the plaintiff cannot succeed. The test under s. 4(1)(a) of the Act to determine whether a cause of action exists is similar to the test applied in application to dismiss a claim on the grounds that it fails to disclose a cause of action. The only difference between the two tests is that the onus to show a cause of action falls upon the party bringing the class action, rather than on the party challenging the proceeding. In his text, *Class Actions in Canada*, looseleaf, (Aurora, Ontario: Canada Law Book, 2001) at paras. 4.70-4.80, W. Branch correctly states the law in this regard as follows:

The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists. This is not a preliminary merits test. As Mr. Justice Winkler stated in *Edwards v.*

Law Society of Upper Canada (1995), 40 C.P.C. (3d) 316 (Ont. Class Proceedings Committee):

There is a very low threshold to prove the existence of a cause of action . . . the court should err on the side of protecting people who have a right of access to the courts.

Courts in B.C. have also adopted a low threshold for this requirement.

[55] In essence, a challenge that the pleadings do not disclose a cause of action is the equivalent of an application under Rule 19(24). [*Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90, 157 D.L.R. (4th) 469 (C.A.) at ¶6-8 [*Endean*]

[56] The determination of that issue is clearly stated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980: "is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action"?

[57] The defendant, as administrator of the Plan, holds a fiduciary role toward the plaintiff and the plaintiff class. The Fund is a trust held for its beneficiaries. The *PBSA* at s. 8(5) imposes statutory duties that require the administrators of a plan to:

- (a) act honestly, in good faith and in the best interests of the members and former members and any other persons to whom a fiduciary duty is owed, and
- (b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

[58] Section 8(6) of the **PBSA** makes clear these duties are imposed “in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of a trustee”.

[59] Section 8(9) of the **PBSA** requires that administrators not knowingly allow their interests to conflict with their duties and powers in respect of the plan.

[60] The plaintiff in paragraphs 13-21 of the Amended Statement of Claim sets forth facts, which when for present purposes are assumed to be true, indicate breaches of duties and obligations owed by the defendant to the plaintiff and plaintiff class.

[61] The plaintiff submits that he and the plaintiff class are particularly vulnerable because their interests are directly impacted by the defendant’s decisions regarding the administration of their Plan. The plaintiff submits that the obligations of the defendant as administrator of the Plan are equal to the fiduciary obligations imposed on trustees, with the trustee’s primary duty being to the beneficiaries of the trust.

[62] The defendant argues that the pleadings do not disclose a cause of action because the plaintiff seeks a share of the actuarial surplus in an ongoing plan to which he has no legal entitlement. [**Schmidt**, *supra* at ¶87; **Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board**, [1999] O.J. No. 3730, 107 O.T.C. 321 (S.C.J.)]

[63] The defendant also argues that the power of the defendant to amend the terms of the Plan is not a power impressed with a fiduciary duty. The conduct

complained of in the Amended Statement of Claim is the amendment of July 1, 1998 to extend the contribution holiday, and the sole cause of action alleged is for breach of fiduciary duty.

[64] The defendant argues it “wear[s] two hats”: when acting as Administrator, it owes fiduciary duties to the beneficiaries, but when acting as employer in passing an amendment to the Plan text, it owes no fiduciary duty. [*Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198]

[65] Finally, the Plan is currently experiencing a solvency deficit. The actuarial surplus of the Plan from December 31, 2002 to December 31, 2003 reduced from \$111,900,000 to \$34,000,000; and its solvency position moved from an excess of \$40,000,000 to a solvency deficit of \$24,100,000. The contribution holiday founding the plaintiff’s complaint ended December 31, 2004. In 2004 the defendant made a contribution of \$19,000,000 to the Plan to remedy the solvency deficit as it was required by law to do because the Plan was in an under-funded position.

[66] The defendant argues it is not possible therefore “...to order that the surplus in the Pension Plan be allocated impartially and even-handedly amongst all Plan members...” as the plaintiff is seeking.

[67] The defendant’s arguments are cogent, however I do not find they demonstrate that the plaintiff is without a cause of action.

[68] The plaintiff is not claiming the defendant has no right to amend the Plan to provide a contribution holiday as a result of the accumulated actuarial surplus, rather

the plaintiff focuses upon the defendant's breach of a duty to "hold the balance between beneficiaries" and of its lack of "even-handedness" by favouring certain beneficiaries and failing to provide all members of the Plan with a commensurate benefit. The basic duties which the plaintiff alleges were breached is commented upon in DWM Waters, *Law of Trust in Canada*, 2nd Ed., (Toronto: Carswell, 1984), at p. 787:

Fiduciaries also have a duty of fidelity to the trust instrument, a duty of care to the "prudent person" standard, and a duty to hold the balance between the beneficiaries.

[69] The courts will intervene to review a trustee's discretion where the balance between beneficiaries has not been held. [*Boe v. U.A., Local 170 Pension Plan (Trustees of)* (1987), 15 B.C.L.R. (2d) 106 (C.A.)]

[70] The *PBSA* addresses the caution needed of an administrator and employer "wearing two hats" in avoiding a conflict of interest.

[71] Clearly, the plaintiff cannot claim against the allocation of a surplus that no longer exists. However, in this case, the plaintiff claims for damages in respect of any amount lost as a result of the defendant's breach of fiduciary duty.

[72] I make no finding as to the strength or substance of the plaintiff's cause of action but I do find the plaintiff has met the test in s. 4(1)(a) of the *Act*. It is not "plain and obvious" that the plaintiff's Amended Statement of Claim discloses no cause of action.

[73] The threshold of proof required is low, and I do not accept that the plaintiff has no chance of success on the basis of the cause of action that is pleaded.

2. There is an Identifiable Class of Two or More Persons – Section 4(1)(b)

[74] Section 4(1)(b) of the **Act** provides the class must consist of an identifiable class of two or more persons. Section 7(d) of the **Act** provides the court must not refuse to certify a proceeding as a class proceeding because the number of class members or the identity of each class member is not known.

[75] The class proposed for certification would be comprised of all:

- (a) Retired Members of the BC Rail Ltd. Pension Plan (the "Pension Plan") as of July 1, 1998 to December 31, 2004;
- (b) Deferred Vested Members of the Pension Plan as of July 1, 1998 to December 31, 2004;
- (c) Spouses, beneficiaries and/or estates who are entitled to pre-retirement or post-retirement survivor benefits from the Pension Plan due to a relationship with persons in paragraphs (a) or (b);
- (d) Members of the Pension Plan who became Retired Members subsequent to July 1, 1998 to December 31, 2004;
- (e) Deferred Vested Members subsequent to July 1, 1998 to December 31, 2004;
- (f) Spouses, beneficiaries and/or estates who are entitled to pre-retirement or post-retirement survivor benefits from the Pension Plan due to a relationship with persons in paragraphs (d) or (e);
- (g) The beneficiaries and/or estates of persons in paragraphs (a) to (f) who died prior to any settlement or judgment in this action.

[76] Although the numbers of the various groups vary with time, the number of retired and deferred vested members is substantial and as of December 31, 1997 would exceed 800.

[77] The defendant takes the position the plaintiff has failed to propose an identifiable class because there is movement of Plan members between the proposed classes, diversity on material issues exists within the proposed class, and most importantly, there are conflicts of interest within the class.

[78] The defendant relies on **Samos Investments Inc. v. Pattison**, [2001] B.C.J. No. 2702, 2001 BCSC 1790 for the proposition that having class members claim damage for different periods of time creates a conflict of interest. However, the decision in **Samos** was predicated on quite different facts than exist here. **Samos** was concerned with three different sets of representations that were made by three different groups of plaintiff class members over three different time periods. The difficulty of proving reliance by class members on representations meant individual issues could predominate over the common issues.

[79] In a recent decision by this court similarly certifying a class action proceeding for breach of fiduciary duty in a pension surplus case, the Court found there was an identifiable class, despite the defendants' argument that movement of members in and out of the class as their employment status changed would create too much uncertainty about class membership [**Williams v. College Pension Board of Trustees** (2005), 254 D.L.R. (4th) 536, 2005 BCSC 788 [**Williams**]. The Court in **Williams** determined that, pursuant to the test for certification expressed by the

Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at ¶39 [*Western*], it was unnecessary for every member of the class be known so long as there were objective criteria available to determine whether or not an individual was a member of the class.

[80] Counsel for the defendant brought to the court's attention *Public Service Alliance of Canada Pension Plan Members v. Public Service Alliance of Canada*, [2005] O.J. No. 2693 (S.C.J.), a recent decision of Charbonneau J. of the Ontario Superior Court of Justice supportive of their position in opposition to the plaintiff's certification application. I do not find the circumstances analogous to those present here. Charbonneau J. found the definition of class "...appeared to be an utterly confused proposition in both the statement of claim and the plaintiffs' factum (at ¶16).

[81] A final definition was proposed by the plaintiff during the course of the certification hearing before Charbonneau J. with the opening phrase, "The proposed class includes ..." (emphasis added), a wholly unacceptable method of defining a class.

[82] I do not find in the present case that the claimants of the proposed class have "... clearly conflicting interest depending on what factual situation is found to exist and/or what impugned modification to the plan the plaintiffs choose to prioritize (at ¶24).

[83] The plaintiff in the present case alleges only one wrong that could lead to different damage awards for class members, however the damage awards would be

amenable to assessment using a mathematical formula based on pensionable service. Thus active members who retired after July 1, 1998 may have a lesser entitlement to damages but their cause of action is the same as the other members of the class.

[84] The present action claims for damages after July 1, 1998. Earlier damages are not claimed. If it is shown that class members may have different entitlement to damages because of different benefits over time, the creation of a sub-class to address the conflict would be appropriate. However, all groups would retain a strong central interest, and the litigation would be advanced by a common finding on the issue of whether the defendant breached its fiduciary duty to all the class members.

[85] The plaintiff does not challenge the creation of the contribution holiday by which the active members benefited. It is the lack of commensurate benefit to other Plan members that constitutes the alleged breach of fiduciary duty. For this reason, the benefit to active members does not itself create a conflict of interest.

[86] I find the plaintiff has met the burden of establishing an identifiable class of two or more persons pursuant to s. 4(1)(b) of the **Act**.

3. The Claims of the Class Members Raise Common Issues – Section 4(1)(c)

[87] Section 1 of the **Act** defines “common issues” as:

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[88] In *Endean*, Smith J. (as he then was) described the requirement that the class members' claim raise common issues at ¶35:

The proper approach to the third statutory requirement engages the following principles. The question of whether individual issues predominate over common issues, which so permeates the American law on this subject, is expressly excluded as a relevant consideration by s. 4(1)(c) of the Act. Further, a common issue need not be dispositive of the litigation. A common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiffs will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary: *Harrington v. Dow Corning Corporation et al* (1996), 22 B.C.L.R. (3d) 97 at 105, 110 (S.C.). As well, the court should not attempt to weigh the ultimate merits of the proposed common questions, but should merely ascertain whether they raise triable issues: *Campbell v. Flexwatt Corporation* (1996), 25 B.C.L.R. (3d) 329 at 343 (S.C.).

[89] The proper approach to the commonality test was provided by McLachlin C.J. in *Western*:

... The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

[90] In *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 [*Rumley*] at ¶29, McLachlin concisely stated that the central issue was "...whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis".

[91] The plaintiff proposes two common issues:

1. Did the defendant breach its fiduciary duties to the class members as alleged in the Amended Statement of Claim?
2. If the defendant did breach its fiduciary duties to the class members, what relief should be granted to the class members?

[92] The issues are capable of determination without regard to the circumstances of any individual class member. The resolution of each common issue will come close to totally disposing of the litigation.

[93] All class members share a common interest in the question of whether the defendant breached its fiduciary duties. The fiduciary duties and alleged breaches are set out in paragraphs 13 to 21 of the Amended Statement of Claim.

[94] The class members share a common interest in remedies that flow from any finding of liability.

[95] The two common issues would be made in respect of every single claim if the claims proceeded on an individual basis.

[96] Resolution of the common issues would significantly advance the litigation and individual damage assessment would be mostly unnecessary if on a finding of liability the quantum was determined using an actuarial formula.

[97] Pension surplus issues have been certified in many cases, including those involving government fiduciaries. [**Authorson v. Canada (Attorney General)** (2000), 53 O.R. (3d) 221 (S.C.J.); **Kranjcec v. Ontario** (2004), 69 O.R. (3d) 231 (S.C.J.)]

[98] In **Givogue v. Burke**, [2003] O.J. No. 1932, [2003] O.T.C. 607 (S.C.J.) the Court certified a class proceeding of members and former members of a pension plan.

[99] **Sadler v. Watson Wyatt & Co.**, [2001] B.C.J. No. 289, 2001 BCSC 246 is an example of this Court certifying a class proceeding of former employees in an action based on breach of fiduciary duty against a plan actuary and trustee.

[100] The phrasing of the proposed common issues in this case is consistent with those of other class actions. [**Anderson v. Wilson** (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (C.A.); **Joncas v. Spruce Falls Power and Paper Co.**, [1999] O.J. No. 2359, 48 O.R. (3d) 179 (Gen. Div.); **Lau v. Bayview Landmark Inc.**, [1999] O.J. No. 4060, 71 O.R. (3d) 487 (S.C.J.); **Rumley**]

[101] Modification of common issues can be made later if necessary. The need for modification of common issues ought not to defeat a certification application.

[**Kumar v. Mutual Life Assurance Co. et al.** (2003), 226 D.L.R. (4th) 112, 170

O.A.C. 165 (Ont. C.A.); **Reid v. British Columbia (Egg Marketing Board)**, [2004] B.C.J. No. 619, 2004 BCCA 177]

[102] The relief sought in paragraph 22(b) and (d) of the Amended Statement of Claim provides for alternate remedies. If there is no surplus now available to the plaintiff class to effect a proportionate distribution of surplus as claimed under paragraph 232(b), the plaintiff claims for damages under paragraph 22(d). The action now may be solely for damages.

[103] I accept that the class members' claims raise the common issues proposed by the plaintiff and are sufficient for certification.

4. A Class Proceeding Would be the Preferable Procedure for the Resolution of Common Issues – Section 4(1)(d)

[104] A policy analysis of the three major advantages of class action legislation is required. These advantages are judicial economy, access to the courts, and behaviour modification. The specific advantages were described by McLachlin C.J. in **Western Canadian Shopping Centres Inc. v. Dutton**, [2001] 2 S.C.R. 534 at

¶27-29:

Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (1999), at para. 1.6;

Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at para. 1.7; Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law -- The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 Harv. L. Rev. 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at para. 1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

[105] In *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 [*Hollick*], McLachlin C.J.

reiterated the importance of these class action advantages at ¶15:

The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or

might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

[106] That access to justice is the overriding consideration was noted by Gray J. in *Bouchanskaia v. Bayer Inc.*, [2003] B.C.J. No. 1969, 2003 BCSC 1306 [*Bouchanskaia*]; See also *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.); and *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729, 2002 BCSC 528 [*Dalhuisen*].

[107] The nature of this action makes it appropriate that the cost of proving liability and quantifying damages be distributed amongst all class members. The individual awards to class members will vary but likely be modest overall. The matter is complex, and legal fees and disbursements for an individual to proceed outside of a class action structure would likely be prohibitive.

[108] Judicial economy would be served by consolidating the large number of claims by potential class members and avoiding inconsistent verdicts should numerous individual actions be taken. The action will require actuarial reports and expert evidence. Certification would allow for economies in cost and time because it would allow the parties to deal with complex legal issues once and avoid repetitive litigation.

[109] The common issues will be largely dispositive of the legal issues in this case. Any outstanding issues can be inexpensively and expeditiously resolved pursuant to s. 27(3) of the **Act**. There is also the prospect a class action will encourage a global settlement [**Dalhuisen**].

[110] The defendant strongly urges that consideration of "...all relevant matters..." as mandated by s. 4(2) of the **Act** does not support a class action as the preferable procedure for a fair and efficient resolution of the common issues.

[111] The defendant argues that there are a significant number of members of the proposed class who would have a valid interest in individually controlling the prosecution of a separate action based upon the amount of money involved [**Hollick**].

[112] The defendant refers to the possibility of some 1500 Plan members claiming a share of approximately \$152 million. I do not find it possible to estimate realistically what any individual's claim might be. It will obviously vary considerably from person to person and from category to category. I note that only the plaintiff has come forward to date with any claim and this suggests a paucity of individuals willing to fund an individual action.

[113] The defendant makes a strong case that arbitration of the plaintiff's claims would be "...more practical and efficient" as specified under s. 4(2)(d) of the **Act**, and "...administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means..." per s. 4(2)(e) of the **Act**.

[114] The defendant argues any individual Plan member could bring an action (or arbitration) and seek an order that the defendant breached its fiduciary duties. It is the defendant's position that such a finding would bind it with respect to all similarly situated Plan members. [**Auton (Guardian ad litem of) v. British Columbia (Minister of Health)** (1999), 32 C.P.C. (4th) 305, [1999] B.C.J. No. 718 (S.C.)]

[115] The defendant's position is that as any one member could commence an action and move to judgment more quickly and efficiently than in a class proceeding the overlay of a class proceeding is unnecessary, and the individual proceeding is less expensive, complex and time consuming than the class proceeding. [**Tiemstra v. Insurance Corporation of British Columbia** (1997), 38 B.C.L.R. (3d) 377 (C.A.)]

[116] The defendant argues that the plaintiff's concern that an individual action exposes the plaintiff to the risk of a significant cost order should the action fail whereas a class action would shield the plaintiff from that exposure is tempered by the fact that the action deals with a trust and traditionally those costs are ordered paid from the trust or by the Administrator. [**Bentall Corp. v. Canada Trust Co.** (1996), 26 B.C.L.R. (3d) 181 (S.C.)]

[117] Nevertheless, protection against a large costs obligation for the plaintiff is certain under a class action proceeding and at best only probable in an individual action.

[118] Pension and benefits cases are regularly tried under class proceeding statutes. Class action proceedings have proven to be an efficient method of resolving pension disputes. [**Ormrod v. Etobicoke (Hydro-Electric Commission)**]

(2001), 53 O.R. (3d) 285, [2001] O.J. No. 754 (S.C.J.); Mr. Justice W. Winkler, "Pensions, Benefits and Canadian Class Action Experience", (2003) 45 *Employee Benefit Issues, The Multiplier Perspective* 35]

[119] Class actions have a demonstrated deterrent effect in preventing instances of large scale wrongdoing. This beneficial effect was noted by Mr. Justice Winkler in his text, "Pensions, Benefits and Canadian Class Action Experience", (2003) 45 *Employee Benefit Issues, The Multiplier Perspective* 35:

In regard to behaviour modification, a third goal of the Ontario class proceedings legislation, pension and benefits class actions ideally have resulted, and will continue to result, in changes to the way employers, administrators, trustees, actuaries, investment managers and other professionals behave with respect to plans and their administration. ... Fiduciaries and professional service providers must act properly or they may be named as defendants in a proceeding, which is something to be avoided.

[120] I find the certification of this action as a class proceeding would engage and promote the desirable goals of judicial economy, access to justice and behaviour modification.

[121] In determining if a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues, section 4(2) of the **Act** requires the Court to consider all relevant matters including the five specific matters in s. 4(2)(a) to (e):

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;
- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[122] I consider the common issues clearly predominate over individual issues in the action and any unresolved individual issues would be minimal. No members of the proposed class have demonstrated an interest in pursuing an individual action.

[123] There is no evidence that any other proceeding has been taken regarding the claims in this action. The defendant proposes the action be stayed in favour of arbitration. Considering only the procedural aspects of an arbitration process I find on balance that the class action proceeding is the preferable method of proceeding. A class proceeding is structured to deal efficiently with large numbers of claimants in a certain and efficient manner. Arbitration was not designed to respond to multi-claimant proceedings and therefore would require constant procedural modification to meet the needs of the parties.

[124] A class proceeding would save class members from the running of limitation periods. Arbitration cannot provide that protection. I appreciate here the defendant has agreed in writing to a stay of limitations pending conclusion of an arbitration. An agreement to waive limitation is not, however, something that the plaintiffs generally

can rely upon and it serves to highlight the class proceeding as a superior mode for multi-party dispute resolution.

[125] I am satisfied on balance that in the present circumstances the preferable procedure for the fair and efficient resolution of the common issues is as a class proceeding.

[126] I am satisfied the proposed plaintiff will fairly and adequately represent the interests of the class. He shares a claim against the defendant in common with the class members and I have found he has no apparent conflict of interest or adversity of interest to the other class members.

[127] The plaintiff understands his duties as a representative plaintiff and is willing to act. He has retained competent and experienced class action counsel to pursue the claim and has presented an adequate plan for the proceeding as required by s. 4(1)(e)(ii) of the **Act**. It is a plan offered at an early stage of the proceeding and therefore is in essence a framework to advance the action which can be suitably amended as the action progresses and is refined. [*Bouchanskaia* at ¶172-3]

COST OF PROVIDING NOTICE TO CLASS MEMBERS

[128] The defendant, as an alternative argument in the event the Court certified the action as a class proceeding, asks the plaintiff be ordered to pay the costs of providing notice to class members under the **Act**.

[129] Counsel for the plaintiff requests the matter be deferred pending a decision on the certification application. I consider it appropriate the matter be deferred as requested to permit full argument as requested.

IS THE ARBITRATION AGREEMENT VOID, INOPERATIVE OR INCAPABLE OF BEING PERFORMED?

[130] The **PBSA** does not make arbitration itself mandatory. The **PBSA** contemplates any other method of dispute resolution to which the parties agree. After the running of the 60 day period for Notice, the **PBSA** allows for the dispute resolution process chosen by the aggrieved party. The legislative intent was for flexibility in the dispute resolution process to best meet the nature and circumstances of the dispute.

[131] The **CAA** provides that where an arbitration agreement is “void, inoperative or incapable of being performed” the court is not required to stay a legal proceeding commenced.

[132] I have certified the plaintiff’s action as a class proceeding and found the class proceeding to be preferable to arbitration for the resolution of the issues.

[133] The issues in dispute in this matter may involve technical matters of pension plan administration procedure. The legal issues however mainly involve the law of equity, trust, contract and statutory interpretation for which a court proceeding is traditionally the more appropriate forum, rather than arbitration.

[134] The policy purpose inherent in the **CAA** is to expedite the dispute resolution and save costs. Neither of these purposes is at issue in this case. The arbitration agreement becomes inoperative in the face of the class proceeding. The individual claims in the present matter are not economical to litigate in the face of the costs to be incurred. The cost of litigation by court proceeding or arbitration has not been shown to be substantially different. The class proceeding provides the defendant with protection against costs if the plaintiff is unsuccessful while permitting the plaintiff to engage counsel on a contingency basis spread amongst the entire class. For this reason, there is little evidence that the costs of a court proceeding will be prohibitive.

[135] The risk of high court costs to plaintiffs pursuing their claims individually is so onerous they are unlikely to proceed, except by class proceeding. The ability of an arbitrator to make a judgment in favour of one plaintiff applicable to other potential plaintiffs who are similarly situated does not provide for contribution by other potential plaintiffs toward the plaintiff's legal costs in obtaining judgment. The prospect of an order for payment of costs from the Plan or by the Administrator in the event the plaintiff was unsuccessful is an uncertain risk the plaintiff is unlikely to assume.

RESULT

[136] The defendant's application for a stay pursuant to s. 15 of the **CAA** is dismissed. The application of the plaintiff for certification of a class proceeding in

accordance with the Notice of Motion of December 14, 2004, save for the adjourned issue as to Notice of Certification, is granted.

“R.R. Holmes, J.”
The Honourable Mr. Justice R.R. Holmes